UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

KAREN L. MANK,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 03-42-P-C***
	)	
ELLEN GREEN, et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTION TO DISMISS

The defendants, Ellen Green and her lawyers, Jack H. Simmons and the firm of Berman & Simmons, P.A., move to dismiss this action asserting claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and federal and state common law. I recommend that the court grant the motion.

I. Applicable Legal Standard

The motion suggests that this court either lacks subject matter jurisdiction over the ERISA and federal common-law claims or that all of the counts fail to state a claim on which relief may be granted. Defendants' Motion to Dismiss the Complaint (Docket No. 5) at 2-3. I agree with the defendants, Defendants' Memorandum of Law in Support of Their Motion to Dismiss the Complaint ("Defendants' Memorandum") (Docket No. 6) at 4, that Fed. R. Civ. P. 12(b)(6), the basis for dismissal when a complaint fails to state a claim on which relief may be granted, is the better approach. *Cement Masons Health & Welfare Trust Fund for Northern California v. Stone*, 197 F.3d 1003, 1007-08 (9th Cir. 1999). The plaintiff adopts this approach without discussing the

alternative. Plaintiff's Opposition to Defendants' Motion to Dismiss the Complaint ("Opposition") (Docket No. 10) at 5. I will not discuss subject-matter jurisdiction further.

"When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in h[er] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d 184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys*., 59 F.Supp.2d 87, 89 (D. Me. 1999).

II. Factual Background

The complaint includes the following relevant factual allegations. The plaintiff is the plan administrator for the Hannaford Health Plan (the "Plan") established by Hannaford Bros. Co. (the "Company"). Complaint (Docket No. 1) ¶¶ 1-2. As such, she is a named fiduciary of the Plan under ERISA. *Id*. ¶ 2. The Company provides various benefit plans and programs to those of its 24,000 employees who are eligible for same. *Id*. ¶ 8. Among the benefits provided by the Company are health care benefits which are offered through the Plan. *Id*. ¶¶ 9-10. The Plan is funded by contributions from the Company and its eligible employees. *Id*. ¶ 11. Defendant Green is an employee of the Company and has participated in the Plan; she is a "covered person" under the terms of the Plan *Id*. ¶ 13.

On or about June 18, 2001Green was involved in an accident in which she was struck by a vehicle while walking. *Id*. ¶ 14. Between June 18, 2001 and October 2001 the Plan paid medical benefits on Green's behalf in the approximate amount of $140,000 for medical care for her injuries arising from this accident. *Id*. ¶¶ 14-16.

By its written terms, the Plan has an equitable interest in a covered person's recovery from a third party to the extent of any benefit payments made by the Plan. *Id*. ¶ 17. Also by its written terms, the Plan is entitled to recover from any third-party recovery the full amount of such benefit payments. *Id*. The Plan must provide payments for medical expenses to covered employees even in circumstances where there may be a future recovery from a third party without waiting until third-party liability is resolved. *Id*. ¶ 18.

At the time of the accident, the Plan included a right-of-recovery provision that provided, in relevant part:

> If the amount of benefit payments made by the Plan is more than should have been paid under the Plan, or if payments are made by a third party with respect to a Covered Person, the Plan shall have the right to recover the excess from the persons it has paid or for whom it has paid . . . .
>
> A Covered Person who recovers payment from a third party shall reimburse the Plan for the amount of benefit payments made, in full and without reduction for attorneys' fees or costs, from the proceeds received from the third party, whether the proceeds are paid by way of settlement, judgment or otherwise, and the Plan shall have an equitable interest in the amount recovered, or to be recovered, for the amount of benefit payments made.

Id. ¶ 19.

Green retained the other defendants to represent her in a legal claim against the third party who caused or was responsible for her injuries. *Id*. ¶ 20. On July 31, 2001 Green completed and signed a request for information relating to injuries caused by the accident in which she acknowledged the Plan's right of recovery. *Id*. ¶ 21. In that document, she also described the accident and provided the name and address of defendant Simmons. *Id*. ¶ 22. On October 3, 2001 Green completed and signed another request for information relating to medical claims for injuries caused by the accident. *Id*. ¶ 23. Both the July 31 and the October 3 documents included the following language:

> I/We am/are aware of the right of recovery provision contained in the Plan. I/We express my/our agreement to be bound by the provision. I/We

> understand, however, that my/our failure to express such agreement shall in no way affect the rights of the Company under the provision. I/We further agree that I/We shall not do anything to prejudice the rights of the Company in this matter.

Id. ¶¶ 21, 23.

The attorney defendants were aware that the Plan paid Green's medical expenses arising from the accident. *Id*. ¶ 24. They understood that the Plan could have a right to recover any medical benefits it paid on Green's behalf that were recovered from a third party in any judgment or settlement. *Id*. ¶ 25. They were aware that Green had executed the July 31 and October 3 documents. *Id*. ¶ 26. Simmons was aware that the payor of medical benefits arising from an accident generally has a lien against any recovery, including a settlement, from a third-party tortfeasor. *Id*. ¶ 27. Simmons was aware that the Plan could be entitled to recover the medical benefits it paid on Green's behalf arising from the accident. *Id*. ¶ 28.

In February 2002 the attorney defendants settled Green's legal claims arising from the accident. *Id*. ¶ 29. Without notifying the Plan, they disbursed settlement proceeds to Green and to themselves as attorney fees and expenses. *Id*. ¶ 31. The attorney defendants never made any payment to the Plan nor contacted the Plan about the settlement. *Id*. ¶ 32.

By letter dated May 24, 2002 the Plan sent Green a copy of the recently-amended right of recovery provision and a Recovery of Plan Assets Notice, requesting that she complete and return the Notice within one month. *Id*. ¶ 33. On June 5, 2002 Green called and spoke by telephone with a Plan representative. *Id*. ¶ 34. In this conversation Green confirmed that she had received the Notice and advised that her legal claims had been settled in February 2002; she refused to disclose the terms of the settlement and stated that Simmons continued to represent her. *Id*. On June 13, 2002 the Plan's counsel sent a letter to Simmons seeking to recover the amounts that the Plan had paid in medical benefits on behalf of Green. *Id*. ¶ 35. By letter dated June 19, 2002 Simmons responded, stating, in

part, that the case was settled and the settlement payment "distributed a long time ago" and that "we were never contacted by Hannaford Bros. and Hannaford Health Plan." *Id*. ¶ 36. On June 24, 2002 the Plan's counsel responded to Simmons' letter, including the July 31 and October 3 documents and requesting information about the settlement amount, the distribution of settlement funds and the time when the Plan would recover the amounts it had paid on Green's behalf. *Id*. ¶ 38. The Plan's counsel again wrote letters to Simmons on July 3, 2002 and August 13, 2002 requesting this information. *Id.*¶ 40. Simmons responded by letter dated August 28, 2002 declining to provide the requested information. *Id*. ¶ 41.

The attorney defendants failed to advise Green of her obligation to repay the Plan for the medical benefits she received. *Id*. ¶ 37. Despite the Plan's demands, the defendants have refused to provide the requested information or to restore to the Plan the approximately $140,000 in medical benefits that the Plan paid on Green's behalf. *Id*. ¶ 42.

III. Discussion

The complaint asserts claims for injunctive and equitable relief under ERISA against Green and the attorney defendants (Counts I-III), for relief under federal common law on various theories against all of the defendants (Counts IV-VII) and for relief under Maine common law (Counts VIII-XI).

A. ERISA Claims

The defendants contend that the ERISA claims must be dismissed because these counts actually seek legal rather than equitable relief, which is not available under the relevant section of ERISA. Defendants' Memo at 5-17. All of the ERISA claims are brought pursuant to 29 U.S.C. § 1132(a)(3). Complaint ¶¶ 7, 45, 49, 55. That statute provides:

> A civil action may be brought —
>
> * * *

> **(3)** by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan . . . .

29 U.S.C. § 1132(a)(3). In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Supreme Court considered the relief available under this section of the statute. In that case, the defendant was injured in a car accident and her medical costs of over $400,000 were paid by the plaintiff health plan. *Id*. at 207. The plan included a reimbursement provision stating that the plan had "a first lien upon any recovery, whether by settlement, judgment or otherwise" that the beneficiary received from a third party. *Id*. The defendant settled a state-court action against the manufacturer of the car in which she was riding at the time of the accident; the settlement allocated $13,828.70 to the plan for reimbursement. *Id*. at 207-08. The plaintiff did not accept that reimbursement and instead filed suit in federal court against the beneficiary and her former spouse seeking reimbursement in full under section 1132(a)(3). *Id*. at 208. The Supreme Court noted that "petitioners seek, in essence, to impose personal liability on respondents for a contractual obligation to pay money — relief that was not typically available in equity." *Id*. at 210. The Court rejected the plan's arguments that it was entitled to injunctive relief to enjoin the beneficiary's failure to reimburse the plan and that it was entitled to equitable restitution. *Id*. at 210-18. Specifically, the Court held that the restitution sought by the plan was legal rather than equitable and therefore not available under section 1132(a)(3). *Id.* at 214, 218. It also rejected an argument that traditional trust remedies did not create an equitable cause of action under the circumstances. *Id*. at 219-220. "Because petitioners are seeking legal relief — the imposition of personal liability on respondents for a contractual obligation to pay money — [§ 1132(a)(3)] does not authorize this action." *Id*. at 221.

The plaintiff attempts to distinguish *Great-West* by characterizing it as "an action to recover money against a participant who did not receive the settlement proceeds from which recovery is sought," Opposition at 6, but that factual aspect of the case was not the basis for the Supreme Court's decision. *Asbestos Workers Local No. 42 Welfare Fund v. Brewster*, 227 F.Supp.2d 226, 228 (D. Del. 2002) (rejecting argument raised by plaintiff here). *Cf. Bauhaus USA, Inc. v. Copeland*, 292 F.3d 439, 445 (5th Cir. 2002) (noting that Justice Scalia found fact that defendant not in possession of disputed funds "extremely important," but upholding dismissal on grounds that claim was "for money due and owing under a contract," making ERISA unavailable as source of relief). She contends that *Great-West* "requires the fiduciary to proceed against parties who are in possession of the funds to which the plan is entitled." *Id*. at 7. It does not; all that the opinion in *Great-West* "requires" is that a plaintiff seeking relief under 29 U.S.C. § 1132(a)(3) be seeking relief that was "typically available in equity." 534 U.S. at 210. The Supreme Court noted that, typically, "a plaintiff could seek restitution *in equity*, ordinarily in the form of a constructive trust or an equitable lien, where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Id*. at 213 (emphasis in original). "But 'where the property sought to be recovered or its proceeds have been dissipated so that no product remains, the plaintiff's claim is only that of a general creditor,' and the plaintiff 'cannot enforce a constructive trust of . . . other property of the defendant.'" *Id*. at 213-14 (quoting Restatement of Restitution § 215, Comment a, at 867 (1936)).

Here, the plaintiff's complaint does not allege that any of the defendants currently possesses or controls the identifiable proceeds of the settlement. Complaint ¶¶ 20, 29-31, 42, 44, 48, 54, 56. The plaintiff contends that the allegations of the complaint "are sufficient to establish that (1) there are

identifiable proceeds and (2) Defendants control such proceeds." Opposition at 7.[1] Even with the benefit of every reasonable inference to be drawn from the allegations, they are not sufficient to establish either point.[2] The federal case law applying *Great-West* emphasizes the importance of this factor. *E.g.*, *Forsling v. J.J. Keller & Assoc.*, 241 F.Supp.2d 915, 918-19 (E.D. Wisc. 2003) (in order for plaintiff to recover, defendant must be in possession of funds, funds must not have been dissipated, money must be identifiable and plaintiff must not be attempting to impose personal liability on defendant); *IBEW-NECA Southwestern Health & Benefit Fund v. Douthitt*, 211 F.Supp.2d 812, 816 (N.D. Tex. 2002) (allowing ERISA claim to proceed where settlement funds held in escrow account by beneficiary's attorney); *Great-West Life & Annuity Ins. Co. v. Brown*, 192 F.Supp.2d 1376, 1381 (M.D. Ga. 2002) (same). *Cf. Westaff (USA) Inc. v. Arce*, 298 F.3d 1164, 1167 (9th Cir. 2002) (even where settlement funds placed in escrow and therefore identifiable, case dismissed for failure to state claim). *See also Unicare Life & Health Ins. Co. v. Saiter*, 37 Fed.Appx. 171, 2002 WL 1301574 (6th Cir. June 10, 2002).

The Supreme Court's decision in *Great-West* requires dismissal of Counts I-III of the complaint.

B. Federal Common Law Claims

Counts IV-VII of the complaint assert claims in federal common law. Complaint ¶¶ 58-83. Specifically, Count IV alleges unjust enrichment against Green, Count V alleges fraud against Green,

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[1] The plaintiff finds particular significance, Opposition at 6-7, in the following language in *Great-West*: "Nor do we decide whether petitioners could have obtained equitable relief against respondents' attorney and the trustee of the Special Needs Trust . . . .," 534 U.S. at 220. That language will not bear the weight which the plaintiff assigns to it. It does not suggest that a plan fiduciary may recover settlement funds from a beneficiary and his or her attorney when the funds have not been placed outside their control. To the contrary, it refers to the fact that at least a portion of the funds in that case were being held in trust and accordingly were identifiable. *Id*. at 207-08.

[2] The plaintiff also contends that her claims may appropriately be characterized as seeking "other appropriate equitable relief" under section 1132(a)(3), Opposition at 8-9, but that avenue is foreclosed by an earlier Supreme Court decision that establishes that the statutory term "any other equitable relief" precludes awards for compensatory damages, *Mertens v. Hewitt Assocs.*, 508 U.S. 248, (*continued on next page*)

Count VI alleges interference with contractual relations against Simmons and the law firm, and Count VII alleges conversion against Simmons and the law firm. In each count the relief sought is repayment to or reimbursement of the Plan. *Id*. ¶¶ 63, 69, 77, 83. Such claims are usually based in state law. The plaintiff correctly points out, however, Opposition at 10-11, that the Supreme Court has stated that "courts are to develop a federal common law of rights and obligations under ERISA-regulated plans," *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989) (citation and internal quotation marks omitted). Beyond this general authorization the courts have recognized limits on this power to create federal common law. The First Circuit, after quoting this language from *Burch*, also stated: "But courts are careful not to allow federal common law to rewrite ERISA's carefully crafted statutory scheme, and recognize that federal common law will only give rise to a claim pursuant to ERISA in the limited class of cases where the issue in dispute is of central concern to the federal statute." *State St. Bank & Trust Co. v. Denman Tire Corp.*, 240 F.3d 83, 89 (1st Cir. 2001) (citation and internal quotation marks omitted; quoting with approval from *United McGill Corp. v. Stinnett*, 154 F.3d 168, 171 (4th Cir. 1998): "Courts should only fashion federal common law when necessary to effectuate the purposes of ERISA." (Citation and internal quotation marks omitted.)). The First Circuit has allowed recovery of contributions mistakenly made to an ERISA plan by an employer under a common-law theory of restitution. *Kwatcher v. Massachusetts Serv. Employees Pension Fund*, 879 F.2d 957, 967 (1st Cir. 1989). *See Vartanian v. Monsanto Co.*, 14 F.3d 697, 703 (1st Cir. 1994) (federal courts may engage in interstitial lawmaking in ERISA cases in the interests of justice).

After *Great-West*, however, such common-law theories of recovery should not be created in order to evade the crucial distinction between legal and equitable means of recovery.

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255 (1993). As discussed below, I conclude that the relief sought under ERISA in this case is compensatory damages rather than equitable relief.

> We have observed repeatedly that ERISA is a comprehensive and reticulated statute, the product of a decade of congressional study of the Nation's private employee benefit system. We have therefore been especially reluctant to tamper with the enforcement scheme embodied in the statute by extending remedies not specifically authorized by its text.

Great-West, 534 U.S. at 209 (citations and internal punctuation omitted). *See also Turner v. Fallon Cmty. Health Plan, Inc.*, 127 F.3d 196, 199 (1st Cir. 1997). The First Circuit has directed courts to act in this regard only "when there is, in fact, a gap in the structure of ERISA or in the existing federal common law relating to ERISA." *Mauser v. Raytheon Co. Pension Plan for Salaried Employees*, 239 F.3d 51, 57 (1st Cir. 2001); *see also O'Connor v. Commonwealth Gas Co.*, 251 F.3d 262, 265 n.4 (1st Cir. 2001). No such gap is discernable in the facts presented in the complaint in the instant case. The fact that the plaintiff lacks a remedy under ERISA at this point may be due to her own failure to act when Green first informed her that Green was pursuing a claim against the third party who caused the accident and provided the plaintiff with the name and address of her attorney, Simmons. At that point, the necessary foundation for equitable relief could have been laid. As the Supreme Court pointed out in *Great-West*, other means to obtain the relief sought may have been available to the plaintiff as well. 534 U.S. at 220. The Supreme Court also stated that the lack of any remedy under the circumstances presented here would not invalidate the limitation established by ERISA on the type of relief a fiduciary may seek. *Id*. at 221.

Counts IV-VII should be dismissed.

C. State Law Claims

The remaining counts of the complaint assert claims under state law. Count VIII alleges unjust enrichment against Green; Count IX alleges fraud against Green; Count X alleges tortious interference with contractual relations against Simmons and the law firm; and Count XI alleges conversion against Simmons and the law firm. Complaint ¶¶ 84-109. The defendants seek dismissal of these pendent

claims on several grounds, including a request that the court decline to exercise jurisdiction over them. Defendants' Memorandum at 23-24. The plaintiff agrees that her state-law claims should be dismissed "[i]f the Court were to dismiss each and every claim under federal law." Opposition at 17 n.17. The statute providing supplemental jurisdiction over state-law claims in the federal courts provides that a federal district court may decline to exercise that jurisdiction if "the district court has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3). The court should do so in this case.

IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion to dismiss be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 30th day of May, 2003.

_____
David M. Cohen
United States Magistrate Judge

Plaintiff

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